DEC 17 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-756

FURNCO CONSTRUCTION CORPORATION,
Petitioner,

vs.

NARCISSE BATISTE, VANDY HAWKINS, CHARLES TEMPLE, AND PERCY WILLIAMS, EACH INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case (its Cases Nos. 73-1255 and 73-1256) entered on September 19, 1974.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on September 19, 1974. This petition is filed within ninety days thereafter, as required by Title 28, Paragraph 2101, subparagraph C of the United States Code, 28 U.S.C. § 2101(c). Jurisdiction of this Court is

invoked under Title 28, Section 1254, Paragraph 1 of the United States Code, 28 U.S.C. § 1254(1).

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit has not yet been officially reported. A copy of said opinion is, for convenience, appended hereto as Appendix A.

STATUTE INVOLVED

The statutory provisions involved are Section 1738 of Title 28 of the United States Code, 28 U.S.C. § 1738, relevant provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000 *et seq.*, the Civil Rights Act of 1866, 42 U.S.C. § 1981, and relevant provisions of the Illinois Fair Employment Practices Act, 48 Ill. Rev. Stat. §§ 851 *et seq.* These provisions are set forth in the statutory appendix attached hereto as Appendix B.

QUESTION PRESENTED

Whether Respondents, having submitted their claim to the Illinois Fair Employment Practices Commission and having obtained a final judgment under Illinois law from that commission granting them full relief, can relitigate, consistent with the requirement of full faith and credit, the very same cause of action in the federal courts under Title VII of the Civil Rights Act of 1964 (as amended) and the Civil Rights Act of 1866?

STATEMENT OF THE CASE

In November, 1969, Respondents filed charges with the Illinois Fair Employment Practices Commission alleging that Petitioner had illegally refused to hire them because of their race. The charges were investigated and, after issuance of a complaint, hearings were held before a Hearing Examiner

appointed by the Illinois Commission. Respondents were represented by their current counsel throughout these proceedings. In February, 1971, the Hearing Examiner issued his Recommended Order and Decision, finding that Respondents had not proved that Petitioner discriminated against them because of their race and recommending that the complaint be dismissed.

After the Hearing Examiner's decision, on March 11, 1971, Respondents filed their complaint in federal district court in Chicago, alleging the exact claims previously litigated before the Hearing Examiner.[1] Both Petitioner and Respondents filed motions for summary judgment before the district court, both motions based entirely upon the record made before the Hearing Examiner of the Illinois Commission. While these motions were pending, on August 26, 1971, the Illinois Fair Employment Practices Commission reversed the Hearing Examiner's findings and issued an order granting Respondents broad relief, including full back pay, future employment, posting of notices, and injunctive relief.[2] Petitioner perfected an appeal under Illinois law to the appropriate state court. This appeal is presently pending.

After the Commission ruling, the district court held that insofar as the judgment of the Illinois Fair Employment Practices Commission is considered a final order in Illinois, the principles of full faith and credit and *res judicata* required the court to give conclusive effect to that judgment as to all issues raised before the Illinois Commission. The court found the Illinois Commission had granted Respondents relief "adequate to protect their entire class" and thus ordered no further relief as to Respondents.[3]

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1. Respondents had filed charges with the federal Equal Employment Opportunity Commission (E.E.O.C.) in February, 1970.

2. Reinstatement was not granted because the construction job in question was previously completed. Petitioner was ordered to employ Respondents on its next job in the state of Illinois.

3. The court also allowed Respondents a discretionary award of attorneys' fees, limited to fees incurred in prosecution of the federal action. The Seventh Circuit overturned this award as part of its remand of the case.

Petitioner appealed to the United States Court of Appeals for the Seventh Circuit, contending again that the principle of full faith and credit barred maintenance of the federal action after a final judgment granting Respondents full relief for the same claim had been obtained before the state commission. The Court of Appeals found that the suit was not barred, reasoning:

> "Defendant also argues that full faith and credit should be afforded to the state determination, thus barring the subsequent Title VII action in federal court. Defendant asserts that the courts have never considered this question before. However, full faith and credit implemented by federal statute (28 U.S.C. § 1738) is the means by which state adjudications are made res judicata. *Lynne Carol Fashions, Inc.* v. *Cranston Print Works Co.*, 453 F. 2d 1177, 1184 (3rd Cir. 1972). And 'other well-defined federal policies, statutory or constitutional, may compete with those policies underlying section 1738.' *American Mannex Corporation* v. *Rozands*, 462 F. 2d 688, 690 (5th Cir. 1972), cert. den. 409 U.S. 1040. It has been determined that the Congressional policies embodied in Title VII require that res judicata not be applied to state adjudications. *Cooper, supra; Voutsis* v. *Union Carbide Corporation*, 452 F. 2d 889 (2nd Cir. 1971); and *Young* v. *South Side Packing Company*, 369 F. Supp. 59 (E.D. Wis. 1973)." Appendix A at A-5.

The court of appeals held, *inter alia*, that the district court had erred in granting summary judgment for Respondents insofar as this decision was premised upon the "conclusive effect" of the decision of the Illinois Commission. The case was remanded to the district court for trial on the merits.

REASONS FOR GRANTING THE WRIT

I. This Case Presents Important Federal Questions Which Have Not Been Settled by This Court.

This case presents two critical federal issues of first impression which should be decided by this Court. These two issues are:

1. Whether and to what extent state agencies have a role in the enforcement of fair employment legislation; and
2. Whether any overriding federal policy compels an exception to the statutory principle of full faith and credit in Title VII cases.

The first issue—the proper relationship between the federal machinery created to enforce Title VII's ban on employment discrimination and state machinery enforcing identical substantive proscriptions under nearly identical statutes—is clearly a matter of great moment. The issue is just one aspect of a broader problem which has spawned much litigation and scholarly comment: *viz.*, the role of federal, state and private tribunals in eliminating employment discrimination. *See, e.g., Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *The King's Garden, Inc.* v. *Federal Communications Commission*, 498 F. 2d 51 (D.C. Cir.) *cert. denied* ..... U.S. ..... (1974); *National Labor Relations Board* v. *Mansion House Center Management Corporation*, 473 F. 2d 471 (8th Cir. 1973); Edwards and Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 Mich. L. Rev. 599 (1971); Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. Chi. L. Rev. 30 (1971); Comment, *Regulatory Agencies and Equal Employment Opportunity—Implications of the A.T.&T. Settlement*, 6 Conn. L. Rev. 86 (1973).

This Court has twice seen fit to hear cases dealing with another aspect of this broad problem, namely the role of labor

arbitration in the employment discrimination context. *Alexander* v. *Gardner-Denver Co., supra; Dewey* v. *Reynolds Metals Co.*, 402 U.S. 689 (1971). The instant case presents an even more important aspect of this broad problem which should be decided by this Court.

Indeed, in contrast to the issue addressed in *Dewey* and *Alexander*, which had not been the subject of substantial legislative concern,[4] the relationship between federal and state enforcement tribunals was a central focus of Title VII itself. The statute mandates deferral of charges to an appropriate state agency,[5] and the purpose for such deferral was explained by various Senators influential in the passage of Title VII. For example, Senator Dirken commented:

> "[W]ith respect to the enforcement of the title, we undertook to keep primary, exclusive jurisdiction in the hands of the State Commissions for a sufficient period of time to let them work out their own problems at the local level." 110 Cong. Rec. 13087 (1964).

And Senator Humphrey, Senate Manager of the bill, stated the reason thus:

> "Mr. President, an objective analysis of the proposed changes to H.R. 7152 as set forth in the substitute package reveals several basic concerns which guided the labors of the negotiators. First, we were concerned that States and localities be afforded every opportunity to resolve these difficult problems of racial justice by means of their own agencies and instrumentalities. In this respect it is perfectly proper to describe the substitute package as a 'States rights bill,' and, I may say, a 'States responsibilities bill.'
>
> "We recognize the good sense of permitting the appropriate State agencies ample time to resolve disagreement arising under Titles II and IV and VII, in particular, through

4. This Court noted in *Alexander*, 415 U.S. at 47:

> "Title VII does not speak expressly to the relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements."

5. 42 U.S.C. § 2000e-5(c). *See Love* v. *Pullman*, 404 U.S. 522, 526 (1972).

> voluntary conciliation and mediation. We recognized that many States already have functioning antidiscrimination programs to insure equal access to places of public accommodation and equal employment opportunity. We sought merely to guarantee that these States—and other States which may establish such programs—will be given every opportunity to employ their expertise and experience. . . ." 110 Cong. Rec. at 12724-25.

Deferral and effective local regulation of employment discrimination is thus the very heart of the Congressional scheme under Title VII.[6]

Moreover, the role of state agencies in eliminating employment discrimination is a question of intense practical concern at this time. The legislative history of the 1972 amendments to Title VII is replete with evidence detailing both the inadequacy of federal resources to deal with the huge volume of charges received, and describing the long delays occasioned by resort to the federal courts. 118 Cong. Rec. 294 (1972) (remarks of Senator Williams); 118 Cong. Rec. 590 (1972) (remarks of Senator Humphrey); 118 Cong. Rec. 935-941 (remarks of Senator Williams). Hearings were recently held before the House Labor Subcommittee on Equal Opportunities in an attempt to determine the causes of the huge federal backlog in this area. 1974 Daily Labor Report (B.N.A.), No. 181 (daily ed. Sept. 17, 1974). And in a recent letter to the chairman of the E.E.O.C., Senators Williams and Javits of the Senate Labor Subcommittee discussed an investigative study of E.E.O.C. procedures made by the General Accounting Office and criticized E.E.O.C. for failing to more effectively use state agencies to reduce the federal backlog of charges. 1974 Daily Labor Report (B.N.A.), No. 180 (daily ed. Sept. 16, 1974).

In this context, the decision below—mandating exclusive federal court enforcement of Title VII and denying state agencies

6. Pursuant to the deferral scheme in the Act, E.E.O.C. has examined the various state fair employment laws to decide where deferral is warranted. E.E.O.C. has classified Illinois as one of 36 states qualifying as "deferral states," 29 C.F.R. 1601.12(f) and (k).

any role at all in the enforcement scheme—raises a serious problem which should be decided by this Court. Indeed, if the decision below is not reviewed, the very purpose behind deferral to local agencies, and one of the central purposes of Title VII, will be thwarted.

Second, this case involves federal recognition of a final state judgment and raises the significant (and as yet unanswered) question of the meaning of full faith and credit in the Title VII context. The court below found that full faith and credit for this Illinois judgment was overshadowed by the statutory policies behind Title VII. Petitioner disagrees with this conclusion, *see infra*, and would note this Court's frequent admonitions that it shall serve as the final arbiter of the degree to which local or federal policies may supplant or overbear full faith and credit requirements. *Hughes* v. *Fetter*, 341 U.S. 609, 611 (1951); *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430, 438 (1943); *Milwaukee County* v. *M. E. White Co.*, 296 U. S. 268, 274 (1935). Moreover, this Court has never sanctioned departure from the "nationally unifying force" of full faith and credit (*Magnolia Petroleum Co.* v. *Hunt*, *supra*, 320 U.S. at 439) in the name of a competing federal policy, and surely the departure by the court of appeals herein mandates review by this Court.

II. The Decision Below Is in Conflict with This Court's Decisions Dealing with the Principle of Full Faith and Credit.

The court below rejected application of full faith and credit in this case, reasoning that full faith and credit is merely the means by which a foreign judgment is made *res judicata* in another jurisdiction, and finding that state fair employment agency decisions should not be held *res judicata* in the federal courts in a subsequent Title VII suit. Neither premise of this argument is tenable, and the appellate court's rejection of full faith and credit places its decision in conflict with this Court's decisions on the subject of full faith and credit.

While it is true that full faith and credit is the means by which final judgments in one state are made *res judicata* in all other jurisdictions,[7] it does not follow that full faith and credit is merely another name for *res judicata*, as the court below held. Unlike *res judicata*, which is a judicial policy created to conserve judicial resources, *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591, 597 (1948); *Lynne Carol Fashions Inc.* v. *Cranston Print Works Co.*, 453 F.2d 1177 (3rd Cir. 1972), full faith and credit is a Constitutional imperative compelled by the need to unify our federal system. *Hughes* v. *Fetter*, *supra*, 341 U.S. at 611-12; *Magnolia Petroleum Co.* v. *Hunt*, *supra*, 320 U.S. at 439-440. Respect for foreign judgments is not a matter of judicial policy, to be ignored by courts as they see fit; it is a basic principle of our system, and exceptions thereto are few and far between, mandated only by the strongest policy considerations. *Broderick* v. *Rosner*, 294 U.S. 629, 642 (1935). As this Court stated in *Williams* v. *North Carolina*, 317 U.S. 287, 294-295 (1942):

> ". . . So far as *judgments* are concerned the decisions, as distinguished from dicta, show that the actual exceptions have been few and far between, apart from Haddock v. Haddock [201 U.S. 562 (1906)]. For this Court has been reluctant to admit exceptions in case of *judgments* rendered by the courts of a sister state, since the 'very purpose' of Art. IV, § 1 was 'to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation.' Milwaukee County v. M. E. White Co., supra, 296 U.S. at pages 276, 277, 56 S.Ct. at page 234, 80 L.Ed. 220." (Footnotes omitted; emphasis in original).

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7. The full faith and credit requirement in this case is imposed by 28 U.S.C. § 1738, quoted in the statutory appendix. This is a statutory extension of the "interstate" full faith and credit requirement imposed by Article IV of the Constitution, *Roller* v. *Murray*, 234 U.S. 738 (1914). The nature and scope of the full faith and credit requirement is the same under either provision. *Davis* v. *Davis*, 305 U.S. 32 (1938); *Adam* v. *Saenger*, 303 U.S. 59 (1938).

This Court has made this principle quite clear in decisions applying full faith and credit in cases very similar to this one. In *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430 (1943), after receiving compensation from the Texas Industrial Accident Board under the Texas workmen's compensation law for an injury incurred in Texas, the plaintiff-employee, a resident of Louisiana, sued in a Louisiana court for the same injury under the Louisiana workmen's compensation law and again prevailed, obtaining a larger judgment from the Louisiana court. Reversing this judgment, this Court held that the full faith and credit clause barred the second and greater recovery in Louisiana because the Texas judgment was *res judicata* and was required to be recognized as such by the Louisiana courts. This Court there stated, 320 U.S. at 439-40:

> "These consequences flow from the clear purpose of the full faith and credit clause to establish throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered, so that a cause of action merged in a judgment in one state is likewise merged in every other. The full faith and credit clause like the commerce clause thus became a nationally unifying force. It altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others, by making each an integral part of a single nation, in which rights judicially established in any part are given nation-wide application. . . . Because there is a full faith and credit clause a defendant may not a second time challenge the validity of the plaintiff's right which has ripened into a judgment and a plaintiff may not for his single cause of action secure a second or a greater recovery."

This principle has also been applied by this Court in cases under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.*, like Title VII a broad piece of social legislation, which was designed to enlarge the remedies of injured railroad

employees. *Sinkler* v. *Missouri Pacific R.R. Co.*, 356 U.S. 326 (1958); *Rogers* v. *Missouri Pacific R.R. Co.*, 352 U.S. 500 (1957). For example, it was held, in *Chicago, R.I. & P. Ry. Co.* v. *Schendel*, 270 U.S. 611 (1926), that the judgment of a state workmen's compensation commission, finding that an accident occurred in intrastate (as opposed to interstate) commerce, was entitled to full faith and credit and barred relitigation of this issue under the F.E.L.A. This Court there stated:

> "It is urged in behalf of respondent that the federal act is supreme and supersedes all state laws in respect of employers' liability in interstate commerce. That is quite true; but it does not advance the solution of the point in dispute, since it is equally true that, in respect of such liability arising in intrastate commerce, the state law is supreme.
>
> * * * * *
>
> "The Iowa proceeding was brought and determined upon the theory that Hope was engaged in intrastate commerce; the Minnesota action was brought and determined upon the opposite theory that he was engaged in interstate commerce. *The point at issue was the same. That the Iowa court had jurisdiction to entertain the proceeding and decide the question under the state statute, cannot be doubted. Under the federal act, the Minnesota court had equal authority; but the Iowa judgment was first rendered. And, upon familiar principles, irrespective of which action or proceeding was first brought, it is the first final judgment rendered in one of the courts which becomes conclusive in the other as res judicata.*" (Emphasis added.)

See also Landreth v. *Wabash R. Co.*, 153 F.2d 98 (7th Cir.), *cert. denied* 328 U.S. 855 (1946). And this same rule has been applied in the federal courts under the Securities and Exchange Act of 1934, *Boothe* v. *Baker Industries Inc.*, 262 F.Supp. 168 (D. Del. 1966) and to litigation under the Constitution. *American Mannex Corp.* v. *Rozands*, 462 F.2d 688 (5th Cir. 1972).

More fundamentally, no exception to the principle of full faith and credit, based upon a competing federal policy, has ever been allowed to defeat federal recognition of a final state judg-

ment on the same cause of action.[8] This Court has allowed traditional state prerogatives (*e.g.*, the power over realty within the state, *Fall* v. *Eastin*, 215 U.S. 1 (1909) or the power of a state to refuse to enforce penal laws of another state, *Huntington* v. *Attrill*, 146 U.S. 657 (1892) *but compare Milwaukee County* v. *M. E. White Co.*, 296 U.S. 268 (1935)) to overshadow full faith and credit, but these exceptions are firmly rooted in the common law. Surely no such well-established policy exists here, requiring an exception to the principle of full faith and credit.

The above cases mandate federal recognition of the state judgment, and dismissal of the federal action, in this case. Here, we have the same parties in federal court, seeking to litigate the same cause of action already decided in the state judgment.[9] The state judgment, issued by a competent commission experienced in the fair employment area, is final under Illinois law[10] and

8. It is significant to note that the sole case relied upon by the Seventh Circuit for the contrary proposition, *American Mannex Corp.* v. *Rozands*, 462 F.2d 688 (5th Cir. 1972), in fact held that a state judgment was entitled to full faith and credit in the federal court. And the Fifth Circuit there stated, 462 F.2d at 690:

> "Whether such a competing federal policy might prevail over the policy embodied in section 1738 is a question we need not, and do not, decide today. . . ."

And *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591 (1948), relied upon by the Fifth Circuit in *American Mannex*, did not involve full faith and credit for a prior state judgment but rather the *res judicata* effect to be accorded a prior determination by the federal Board of Tax Appeal.

9. Although Respondents have couched their claim in a federal guise, this does not alter the fact that this is the very same claim resolved in Illinois. *Angel* v. *Bullington*, 330 U.S. 183 (1947); *Jackson* v. *Irving Trust Co.*, 311 U.S. 494, 503 (1941). In fact, the identity of the claims is shown by Respondents' (and Petitioner's) willingness to rely exclusively upon the record made in the state proceeding in the subsequent district court litigation.

10. The Illinois Commission order is a reviewable final order under the Illinois Administrative Review Act, 110 Ill. Rev. Stat. § 274. Illinois treats an otherwise final order being appealed as final. *Sixty-Third and Halsted Realty Co.* v. *Goldblatt Bros.*, 342 Ill. App. 389, 96 N.E.2d 838, *aff'd*, 410 Ill. 468, 102 N.E.2d 749 (1951). It is clear, of course, that full faith and credit attaches to final ad-

resolves the same question raised in the federal action---whether Petitioner discriminated against Respondents—under a statute virtually identical to the federal statute in both proscription and remedy.[11] And finally, it is quite clear that Respondents were speedily granted a broad remedy by a competent state agency skilled in administering a parallel statute which fully and adequately vindicates their right to be free from discrimination under any statute.[12]

In this situation, there is no compelling federal policy which mandates rejection of full faith and credit and requires relitigation of this same cause of action in federal court. Indeed, extremely important federal policies—including the promotion of local responsibility in the field of employment discrimination as well as the need to avoid duplicative litigation—support rather than oppose application of full faith and credit to the Illinois judgment. And the first decisions of this Court, as noted above, mandate application of full faith and credit in clear conflict with the decision below.

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ministrative orders as well as final judicial decisions. *Magnolia Petroleum Co.* v. *Hunt, supra.*

11. The Illinois Fair Employment Practices Act is, as noted by the District Court below, "markedly similar" to Title VII. The E.E.O.C. has classified Illinois as a "deferral state" with state fair employment machinery meeting the stringent standards of comparability set forth at 29 C.F.R. § 1601.12(f), 29 C.F.R. § 1601.12(k). Once again, perhaps the best indication of the similarity between Title VII and the Illinois statute is Respondents' willingness to rely exclusively on the Illinois record in its Title VII case.

12. The fact that this litigation also encompasses a claim under the Civil Rights Act of 1866 does not alter application of the above principles. *See Taylor* v. *New York City Transit Authority,* 433 F.2d 665 (2d Cir. 1970).

CONCLUSION

Petitioner submits that the decision below raises critical issues which should be decided by this Court, and respectfully prays that this Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Nos. 73-1255 and 73-1256

NARCISSE BATISTE, VANDY HAWKINS, CHARLES TEMPLE, and PERCY WILSON, Each Individually and on Behalf of All Others Similarly Situated,

Plaintiffs-Appellants, Cross Appellees;

vs.

FURNCO CONSTRUCTION CORPORATION,

Defendant-Appellee, Cross Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division—No. 71 C 615
RICHARD B. AUSTIN, *Judge*

Argued November 29, 1973—Decided September 19, 1974

Before CLARK, *Associate Justice,** CASTLE, *Senior Circuit Judge*, and GRANT, *Senior District Judge.***

GRANT, *Senior District Judge*. Both the plaintiffs and the defendant have appealed from an order of the district court

* Associate Justice Tom C. Clark of the Supreme Court of the United States (Retired) is sitting by designation.

** Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

which held this cause to be a class action, allowed the addition of a named plaintiff and granted summary judgment for plaintiffs while denying them all relief other than Four Hundred Dollars ($400.00) in attorney's fees.

Plaintiffs brought this action pursuant to Section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq., alleging that plaintiffs, who are Negro bricklayers, were denied employment by Defendant Furnco Construction Corporation because of their race. They requested that the cause be treated as a class action and they sought injunctive relief as well as back pay and attorney's fees.

After they had been denied employment in 1969, plaintiffs had filed timely complaints with the Illinois Fair Employment Practices Commission (F.E.P.C.), and the federal Equal Employment Opportunity Commission (E.E.O.C.). Extensive hearings were held before a hearing examiner of the F.E.P.C. who issued a recommendation on February 3, 1971, that the complaints be dismissed. On February 8, 1971, the E.E.O.C. advised plaintiffs of their right to file suit in the appropriate federal District Court, and plaintiffs then instituted this action. Defendant Furnco Construction Corporation filed a motion for summary judgment alleging that plaintiff's action was barred by the doctrine of election of remedies. Plaintiffs filed their motion for summary judgment and an application for leave to add an additional party-plaintiff, Sylvester Williams, who had participated in the action before the F.E.P.C. and the E.E.O.C., but who had not been named in the original complaint.

Meanwhile, on August 26, 1971, the Illinois Fair Employment Practices Commission rejected the hearing examiner's recommendation and entered an order directing the defendant to cease and desist the unfair labor practices complained of, and to offer to employ the plaintiffs as bricklayers on the next job defendant performed in Illinois. Finally, the Commission awarded lost wages to the plaintiffs. Defendant appealed this

order to the appropriate State Circuit Court (where the cause is still pending), thus staying the order of the Commission.

On October 30, 1972, the U. S. District Court issued a "Memorandum Opinion and Judgment Order" in the instant cause of action. See *Batiste* v. *Furnco Construction Corporation*, 350 F.Supp. 10 (N.D.Ill. 1972). The district court granted plaintiffs leave to proceed as a class, representing all who are or might become victims of defendant's racially discriminatory employment practices, and granted plaintiffs leave to add Sylvester Williams as a party-plaintiff in this action. Furthermore, relying on the determination of the Illinois Fair Employment Practices Commission, the court granted plaintiff's motion for summary judgment on their complaint, but limited recovery to the only relief that the F.E.P.C. had not granted plaintiff, namely, attorney's fees. Thereafter, plaintiffs submitted a verified petition requesting $12,987.00 for 288.6 hours spent on the federal court action. The court awarded plaintiffs $400.00 in attorney's fees, noting that plaintiffs' request was clearly excessive. Thereafter, both parties instituted appeals from the district court's ruling.

This court is presented with many issues in this action. First, both parties have challenged the district court's award of summary judgment. Defendant asserts that plaintiffs were not entitled to summary judgment, while plaintiffs contend that once the court granted summary judgment it should not have limited recovery to attorney's fees, but provided the injunctive relief and back-pay requested.

In this appeal defendant asserts that the doctrines of election of remedies, res judicata and full faith and credit, bar plaintiffs from bringing their action to federal court after the F.E.P.C. adjudicated plaintiffs' claims. Although plaintiffs were required by 42 U.S.C. § 2000e-5(c) to first present their claims to the appropriate state authority for 60 days, defendant argues that by continuing to allow the state authority to adjudicate the action instead of removing it at the end of the 60-day period, plaintiffs

have elected their remedy and are barred from bringing their action to the federal courts. Noting that the F.E.P.C. is afforded res judicata by the Illinois courts, defendant contends that the federal courts should give the Commission's decision full faith and credit whether it had been favorable or unfavorable to plaintiffs or whether or not it might later be reversed.

We must agree with the ruling in *Cooper* v. *Philip Morris, Inc.*, 464 F.2d 9 (6th Cir. 1972) where the court squarely rejected the application of the doctrines of election of remedies and res judicata to Title VII actions where plaintiffs had litigated their charges to final adjudication in state proceedings. There is a strong Congressional policy that plaintiffs not be deprived of their right to resort to the federal courts for adjudication of their federal claims under Title VII. Recently, Congress amended Title VII to explicitly provide that:

> In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by state or local authorities in proceedings commenced under state or local law pursuant to the [deferral] provisions of subsections (c) and (d). 42 U.S.C. § 2000e-5(b), as amended by Public Law 92-261; 86 Stat. 103 (1972).

While this provision is addressed to the E.E.O.C. rather than the courts, it is strongly indicative of the Congressional policy that final responsibility for the administration of Title VII rests within the federal system.[1] See *Cooper, supra*, 464 F.2d at 12. It is also apparent that if federal actions are barred by the application of election of remedies and res judicata, then the statutory scheme of deferral to state proceedings will be frustrated by requiring that the plaintiff, who desired to bring an action in

1. It would be meaningless for Congress to set up standards for E.E.O.C. examination of cases after determinations were made in state proceedings if Congress intended that those cases be barred from consideration in federal court. The E.E.O.C., which lacks enforcement power, would be attempting to mediate with defendants who were already protected from any further legal action.

federal court, first commence state proceedings but abandon them quickly before an adjudication is made.

Defendant also argues that full faith and credit should be afforded to the state determination, thus barring the subsequent Title VII action in federal court. Defendant asserts that the courts have never considered this question before. However, full faith and credit implemented by federal statute (28 U.S.C. § 1738) is the means by which state adjudications are made res judicata. *Lynne Carol Fashions, Inc.* v. *Cranston Print Works Co.*, 453 F.2d 1177, 1184 (3rd cir. 1972). And "other well-defined federal policies, statutory or constitutional, may compete with those policies underlying section 1738." *American Mannex Corporation* v. *Rozands*, 462 F.2d 688, 690 (5th Cir. 1972), cert. den. 409 U.S. 1040. It has been determined that the Congressional policies embodied in Title VII require that res judicata not be applied to state adjudications. *Cooper, supra; Voutsis* v. *Union Carbide Corporation*, 452 F.2d 889 (2nd Cir. 1971); and *Young* v. *South Side Packing Company*, 369 F.Supp. 59 (E.D. Wis. 1973).

This Circuit has noted that where procedures for dual or parallel remedies are provided, duplicative relief must be avoided to the extent that there be no unjust enrichment. *Bowe* v. *Colgate-Palmolive Company*, 416 F.2d 711, 715 (7th Cir. 1969). Clearly, the federal court action need not be barred in order to prevent duplicative monetary awards, should a plaintiff prevail in both federal and state actions, since the district court is capable of fashioning relief which could preclude an unjust enrichment or windfall. *Lopez* v. *State Foundry & Machine, Inc.*, 336 F.Supp. 34, 37 (E.D. Wis. 1972).[2] Accordingly, we find that the fact that final judgment was issued in the state proceedings does not bar this action nor deprive plaintiffs of their right to relief in federal court.

However, the district court erred in entering summary judgment for the plaintiffs. It is evident from the record and the

2. It should again be noted that plaintiffs have yet to achieve any relief at all.

district court's opinion that it merely accepted the ruling of Illinois Fair Employment Practices Commission and it did not attempt to make its own determination. While a defendant can be required to defend again, it cannot be forced to accept the prior findings, and the federal court must conduct its own inquiry. *Young, supra,* 369 F.Supp. at 61. If, as the district court noted, the parties did not desire to present the evidence again, the prior state record could have been introduced and stipulated as containing all the pertinent evidence and the court could have based its determination on that evidence without a new trial; however, the court was required to examine that evidence and make its own findings.

Next, defendant challenges the district court's determination that this cause should be treated as a class action and that Sylvester Williams could be added as a party-plaintiff. Plaintiffs sought to proceed as a class representing all Negro bricklayers who are or might ever become the victims of defendant's racially discriminatory employment practice, in order to request that the district court enjoin defendant from employing such practices in the future. As the district court noted, plaintiffs' allegations of the existence of such a class was sufficient to meet all of the requirements of Rule 23(a), F.R.Civ.P. Further, membership in such a class would not have to be limited to those individuals who had filed charges with the E.E.O.C. prior to instituting this suit. *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968). Defendant has contended that the evidence establishes that there has been no pattern of discrimination which would merit the injunctive relief plaintiffs have sought for the class. However, the district court has yet to review the evidence and, at the time that the district court makes its ruling on the cause, it can also also determine to what extent relief for the class would be required. *Spogis* v. *United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971).

The district court determined that inasmuch as this cause was a class action, Sylvester Williams could be added as a

party-plaintiff. The court correctly noted the fact that his failure to join in the suit within 30 days after the E.E.O.C. issued its right-to-sue letter, as required by 42 U.S.C. § 2000e-5(e), would not bar him from joining in the class action, and that Sylvester Williams was a proper member of the class. Further, failure to commence the action within the 30-day period as required by 42 U.S C. § 2000e-5(e) would not bar his action under 42 U.S.C. § 1981 et seq. *Battle* v. *National City of Cleveland*, 364 F.Supp. 416 (1973).

Plaintiffs have contended that the district court abused its discretion when it awarded plaintiff only $400.00 in attorney's fees. However, the court has held that an award of attorney's fees can only be made to a prevailing party and as a general guideline the amount of the award should be proportionate to the extent that the party has prevailed in the suit. *Williams* v. *General Foods Corp.*, 492 F.2d 399 (7th Cir. 1974). In view of our reversing and remanding this action, determination of who are the prevailing parties can only be made after completion of the district proceedings upon remand. Accordingly, we make no comment regarding attorney's fees and reserves that judgment for further consideration.

For the foregoing reasons, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

APPENDIX B

STATUTORY APPENDIX

Article IV, § 1, United States Constitution

> Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved the Effect thereof.

28 U.S.C. § 1738

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings of copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Relevant Portions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000-e *et. seq.*

> Sec. 703. (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or

privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

Sec. 706.

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

42 U.S.C. § 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Relevant Portion of the Illinois Fair Employment Practices Act, 48 Ill. Rev. Stat. § 851 *et seq.*

§ 3. Unfair employment practices) It is an unfair employment practice:

(a) For any employer, because of the race, color, religion, sex, national origin or ancestry of an individual to

refuse to hire, to segregate, or otherwise to discriminate against such individual with respect to hire, selection and training for apprenticeship in any trade or craft, tenure, terms or conditions of employment . . . .

§ 8. Procedure—Charge, investigation, conference, settlement and adjustment.) Whenever within 180 days after the date that an unfair employment practice allegedly has been committed, a charge in writing under oath or affirmation is filed with the Commission by a complainant and in such detail as to substantially apprise any party properly concerned as to the time, place and facts with respect to such alleged unfair employment practice, that any employer, labor organization, employment agency, or person, hereinafter referred to as a respondent, has committed such unfair employment practice, the Commission shall promptly serve a copy of the charge within 10 days on the respondent and thereafter shall institute an investigation by its employees to ascertain the facts relating to such alleged unfair employment practice. If it is determined by the Commission, after such investigation, that there is not substantial evidence that the alleged unfair employment practice has been committed, the charge shall be dismissed: otherwise the Commission, a Commissioner or a hearing officer, who shall be an attorney licensed to practice in Illinois, designated by the Commission, shall endeavor to eliminate the effect thereof and prevent repetition thereof by means of conference and conciliation. . . .

§ 8.01. Procedure--Complaint, answer, hearing and order.) (a) In case of failure to settle or adjust any such charge by conference and conciliation in accordance with Section 8 of this Act, the Commission shall cause to be issued and served upon such respondent a written complaint, under oath or affirmation, stating the charge of unfair employment practice substantially as alleged in the charge theretofore filed with the Commission as hereinbefore provided in Section 8 of this Act and the relief sought on behalf of complainant and containing a notice of public hearing before a commissioner or a duly appointed hearing examiner . . . .

(c) When all the testimony has been taken, the commissioner or hearing examiner shall determine whether the

respondent has engaged in or is engaging in the unfair employment practice with respect to the complainant as charged in the complaint. A determination sustaining a complaint shall be based upon a preponderance of the evidence. The commissioner or hearing examiner then shall state his recommendations in writing and, if he finds against the respondent, shall issue and cause to be served on such respondent and the complainant a recommended order requiring such respondent to cease and desist from the unfair employment practice complained of, and to take such further affirmative or other actions with respect to the complainant as will eliminate the effect of the practice complained of. . . .

§ 8.02. Procedure—Review by Commission, order.) (a) The recommended order of the commissioner or hearing examiner shall be filed with the Commission.

* * * * *

(e) The Commission, within the limitations of time as fixed in this Section, may, in its discretion, or for good cause, order a trial de novo before the Commission upon application of either party. The complaint and other documents in the nature of pleadings filed by either party, together with the recommended order of the commissioner or hearing examiner and the statement of facts or transcript of evidence hereinbefore provided, shall be the record of the proceedings and shall be subject to review as hereinafter provided.

(f) The Commission may, at any time prior to final order of the Court in a proceeding under Section 10 or 11, upon reasonable notice, modify or set aside in whole or in part, any finding or order made by it except an order or finding that a respondent has not engaged in the unfair employment practice charged in the complaint.

* * * * *

§ 10. Review under Administrative Review Act.) Any complainant or respondent may apply for and obtain judicial review of an order of the Commission entered under this Act in accordance with the provisions of the "Administrative Review Act," approved May 8, 1945, as heretofore or hereafter amended; and the Commission in proceedings

under this Section may obtain an order of Court for the enforcement of its order.

§ 11. Judicial enforcement.) Whenever the Commission concludes that any person has violated a valid order of the Commission issued pursuant to Sections 8, 8.01 and 8.02 of this Act, and the violation and its effects are not promptly corrected, the Commission shall commence an action in the name of the People of the State of Illinois by petition, alleging the violation, attaching a copy of the order of the Commission and praying for the issuance of an order directing such person, his or her or its officers, agents, servants, successors and assigns to comply with the order of the Commission. Upon the commencement of such action the Court shall have jurisdiction of the proceedings and power to grant or refuse, in whole or in part, the relief sought or such other remedy as the Court may deem proper, provided that the Court may stay an order of the Commission in accordance with paragraph (1)(a), Section 12 of the "Administrative Review Act," pending disposition of the proceedings. The Court may punish for any violation of its order as in case of civil contempt. Actions of the Court under this Section shall take precedence over all other matters except matters of the same character.